RECENT AMERICAN DECISIONS.

Supreme Court of Tennessee.

BATES v. TAYLOR, GOVERNOR.

The Courts have no jurisdiction over the Chief Executive of a State, to compel or restrain the performance of any official duty, whether executive or ministerial.

B filed a bill in equity, to compel A, the Governor of the State, to deliver to complainant a certificate of election to membership in Congress, and to enjoin the issuance of one to another applicant. The Constitution of Tennessee required the Governor to perform certain duties, and such others as might be devolved upon him by statute. Among the latter provided by the Code, was that of issuing a commission to each person elected to Congress. Facts were alleged tending to show that B had been duly declared elected, and that A had signed and sealed a commission to B, but pending its delivery, had changed his mind, and was about to issue a commission to C, a contestant. On motion to dismiss, *held*, that the Court had no jurisdiction over the Governor to grant the relief prayed for.

APPEAL from Chancery Court of Davidson County.

A bill was filed in the Chancery Court at Nashville, Tennessee, by Creed F. Bates, complainant, against Robert L. Taylor, Governor of the State, to compel the latter to deliver a certificate of election to the complainant and to prevent the issuance of a certificate to H. Clay Evans, another applicant.

Complainant alleged in substance, that he was elected to membership in the Fifty-first Congress of the United States, in the Third Congressional District of Tennessee, on the sixth day of November, 1888; that the fact of his election was duly ascertained by the Governor and Secretary of State, who by law constituted a board to canvass the returns; that, thereupon, in further compliance with the law, a certificate, showing the fact of his election, was made out, signed by the Governor, attested by the Secretary of State, and sealed with the great seal of the State; that, after all this, the Governor refused to deliver said certificate to the complainant, and claimed that one H. Clay Evans was elected to said office and entitled to receive a certificate of election instead of complainant; and that the Governor was about to issue a certificate to said Evans, though the latter was not elected and the Secretary of State would not join the Governor in such certificate.

Complainant further alleged that when the said board acted, and the certificate reciting his election was signed, attested and sealed, the board's power was exhausted and complainant's rights became fixed and his title to the office complete; that the board could not subsequently reconsider its action and declare another person elected; that in no event had the Governor a right to reconsider the matter himself, and issue a certificate to Evans, without the concurrence of the Secretary of State; that the issuance of a certificate to Evans would, in view of foregoing facts, be a usurpation of authority on the part of the Governor to the great and irreparable injury of complainant.

The prayer of the bill was that the Governor be enjoined from issuing a certificate to Evans, and that he be compelled to deliver the one already signed, attested and sealed to complainant.

The Governor appeared by counsel and moved the Court to dismiss the bill—

1. For want of equity on the face of the bill.
2. For want of jurisdiction in the Court.
3. Because it is unfit for a court of equity.

The Chancellor sustained the motion and dismissed the bill. Complainant appealed.

Vertrees & Vertrees, Hill & Grassbery and *Marks & Marks*, for complainant.

A. S. Colyar, Demoss & Moline and *S. Watson*, for respondent.

CALDWELL, J., Feb. 16, 1889, (after stating the foregoing facts): The main question debated at the bar, and that which is conclusive of the case, is one of jurisdiction.

The Constitution ordains that the Governor of the State shall perform certain duties therein prescribed, and such others as may from time to time be devolved upon him by act of the Legislature—Art. III. Among the duties so devolved upon him by statute is that of issuing a commission or certificate of election to each person elected representative to Congress. Code (M. and V.) sections 1094 and 1146. The issuance of

such commission or certificate, whether called a ministerial or an executive duty, is an official action, whose performance can be neither coerced nor restrained by the courts.

An attempt on the part of the courts to control his action under the statute would be an invasion by one department of the Government of the rights of another department, and, for that reason, a violation of sections 1 and 2 of Article II of the Constitution, which are in the following language:

"Sec. 1. The powers of the Government shall be divided into three distinct departments—the legislative, executive and judicial.

Sec. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed or permitted."

It is well settled by all the authorities that mandamus will not lie to compel the Governor of a State to perform duties of a purely executive or political nature, involving the exercise of official judgment and discretion, but the decisions are wide apart as to the power of the courts to compel him to discharge those duties, which as other official duties are called ministerial.

The courts of Ohio, Alabama, California, Maryland and North Carolina, are together in holding that the Governor may be required by mandamus to perform duties of the latter class; while the courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey and Rhode Island, have uniformly held the contrary, upon the grounds that the powers of Government in the States are distributed among three departments, which under the organic law are to be and remain independent of each other: High on Extraordinary Legal Remedies, sections 118, 119, 120 and 121. This author cites the cases from the different States mentioned. We have examined them, and also a very instructive case from Michigan: *Sutherland* v. *The Governor* (1874), 29 Mich. 321, which is in accord with those from the States last mentioned, and we are fully persuaded not only that the weight of authority, but also the weight of reason, is against the power of the courts to coerce the Chief Executive of a State into the performance of any official duty.

This Court has heretofore put itself in line with those courts

denying the existence of such power: *Turnpike Company* v. *Brown* (1875), 8 Baxt. (Tenn.), 490. In that case, the Turnpike Company sought, by mandamus, to compel Governor Brown to issue certain bonds of the State which, it claimed, the Legislature had directed to be issued by the Governor. The relief was refused upon two grounds: first, because the company had not shown itself entitled to the bonds; and, secondly, because the Court had no jurisdiction to control the action of the Governor with respect thereto.

In combatting the idea that the Governor might be compelled to perform a ministerial duty, the Court, speaking through Judge McFARLAND, said: * * * "The Governor holds but one office, that is the office of Chief Executive. Any duty which he performs under authority of law is an executive duty, otherwise we would have him acting in separate and distinct capacities. In some respects he would be the Chief Executive, an independent department of the Government; as to others he would be a mere ministerial officer, subject to the mandate of any Judge of the State; and we must assume also that the Judge would have the power to imprison the Governor if he refused to obey his order, for if the Court has this jurisdiction, the power to enforce the judgment must follow." See 8 Baxt., 493. The jurisdiction was denied, upon the ground that the courts had no right to interfere with the head of another department of the Government in the discharge of a duty by law devolved upon him.

But it is now argued that so much of the opinion in that case as relates to the question of jurisdiction was *obiter dictum*, because the question decided in an earlier part of the opinion was conclusive of the case. This cannot be so. Both questions were fairly raised by the record, and the fact that the question of jurisdiction was discussed last, does not make it any the less entitled to the force of an adjudication.

It is further contended that this Court disregarded and overruled that part of that decision by taking jurisdiction of a mandamus proceeding against Governor Marks, in the late case of the *State ex rel.* v. *Board of Inspectors* (1880), 6 Lea (Tenn.), 12. The question of jurisdiction was expressly reserved in that case, for the reason, as stated in the opinion, that the Governor

had in his answer declared his willingness to submit to the direction of the Court.

Whether jurisdiction of the person in such a case can properly be confirmed in that way, is not material in this case. It does not arise here. It did arise there, and the Court exercised all the power of jurisdiction—whether rightfully or wrongfully, can neither affect the present case nor impair in any degree the authority of the Brown case. Jurisdiction was taken in Missouri: *R. R.* v. *The Governor* (1856), 23 Mo. 353, upon a similar expression from the Governor, while in Michigan it was refused: *Sutherland* v. *The Governor*, 29 Mich. 321.

We have no hesitation in holding that the courts have no jurisdiction to compel the Governor to deliver to complainant the certificate claimed by him, no more than have they the power to restrain him from issuing a certificate to the other applicant. If the Governor cannot be compelled by mandamus to deliver a certificate of election to one person, it follows that he cannot be restrained by injunction from delivering it to another person; for the nature of the act to be performed by him is precisely the same in one case as in the other, and the same considerations operate to defeat the jurisdiction of the courts in both instances.

But, conceding for the sake of the argument that the Governor could not, in the first instance, have been compelled to give the certificate to complainant or prevented from giving it to Evans, the very able and learned counsel of complainant go further and insist, with great force and plausibility, that the Chief Executive of a State may be enjoined from doing an unlawful thing; that, under the facts disclosed in the bill, the act sought to be restrained is unlawful, and that, being unlawful, its performance may be prevented by injunction.

The essence of these facts is that the Governor and Secretary of State together reached the conclusion from the returns that complainant had been elected, and, thereupon, prepared, signed, attested and sealed a certificate showing that fact, and that before the delivery of that certificate the Governor changed his mind, decided that Evans was elected, and without the concurrence of the Secretary of State, was about to issue a certificate to Evans, when this bill was filed.

The statute devolving upon the Governor the duty of issuing a commission or certificate of election necessarily confers upon him the right of determining when and how that duty, within the law, must be performed; and when he comes to do the thing required, he must be allowed to do it according to his own judgment as to the meaning of the law and on his own sense of official responsibility under his oath. In other words, it is his province to construe the statute for himself, and to determine for himself when he has complied with all its requirements, and when there yet remains something for him to do—whether he may act alone under a given state of facts, or must act in conjunction with another; and so long as he acts in good faith and with an honest purpose, discharging his duty under the law, his action cannot appropriately be characterized as unlawful. In such case the courts have no power to substitute their construction or judgment for his, and tell him when to stop or when to go on.

If they have such authority as to one statute imposing an obligation upon him, they have it as to all such statutes, and with respect to all requirements made of him by the Constitution as well.

Such a view would put the responsibility of the Governor's office upon the judiciary, and virtually make him subject to the direction of the courts in every action he might take—thereby working a substantial destruction of one department of the State Government, and a usurpation of its functions by another, contrary to the genius, spirit and letter of the Constitution.

If the Governor act corruptly he is amenable to the Legislature; and if, in an honest endeavor to discharge his duty, he mistake the law and prejudice individual rights, the injured person may in proper cases restrain the one benefited from using his advantage.

Let us illustrate the connection and at the same time the independence, the checks and balances, of the three departments of government: The Legislature should never pass nor the Governor approve an unconstitutional law; yet, because the duty of enacting laws rests upon the one, and that of approving or disapproving them upon the other, the courts cannot

restrain the former from passing nor the latter from approving a statute obviously unconstitutional. While acting in their own appropriate spheres the Legislature and the Governor must be allowed to judge of the constitutionality of the law for themselves. After that the judiciary acts, and, at the suit of some interested party, annuls the law because violative of the Constitution. Thus the integrity and independence of each department are preserved, conflict between them is prevented, and the injurious application of an unconstitutional law is averted.

We do not think the decisions of the Supreme Court of the United States stand in the way of the conclusion we have reached, though the Federal courts have, in several instances, taken jurisdiction of proceedings against the Governors of certain States and put them under restraint by injunction.

In *Davis* v. *Gray* (1872), 16 Wall. (83 U. S.) 203, Gov. Davis, of Texas, was enjoined from wrongfully issuing patents to land, which had previously been granted to other persons. The Governor of Louisiana was restrained from issuing bonds under an unconstitutional act, in the case of *Board of Liquidation* v. *McComb* (1875), 92 U. S. 531. In another case, the Governor of Missouri and others acting with him were by injunction prevented, or restrained for a time, from selling certain property to enforce statutory mortgage liens claimed by the State, the claim by the adverse party being that the liens had been satisfied: *Ralston* v. *Missouri Fund Commissioners* (1886), 120 U. S. 391.

The Davis case was cited approvingly in *Allen* v. *Railroad* (1884), 114 U. S. 311, and *In Re Ayers* (1887), 123 Id. 506; while it was questioned and limited in *Cunningham* v. *Macon & Brunswick Railroad* (1883), 109 Id. 453.

Now, the most that can be said of these cases is, that they show the jurisdiction of the Federal courts to restrain the Governor of a State from doing a wrongful act to the injury of individual rights. It is not even intimated in any one of them that the State courts have any such jurisdiction. There is a wide difference between the relation of the Federal judiciary and the State judiciary to the Governor of the State, and because of that difference, the Federal decisions referred to are

not at all in point in this case. A State's judiciary sustains the same relation to its Governor that the Federal judiciary does to the President of the United States; and as a State court, by reason of that relation, has no jurisdiction to coerce or restrain the Governor with respect to his official duties, so the Federal courts, for the same reason, have no power to interfere with the official acts of the President. It was so held in the case of the *State of Mississippi* v. *Johnson* (1866), 4 Wall. (71 U. S.) 499. In that case, the State of Mississippi, as party complainant, sought by injunction to restrain President Johnson from the execution of the reconstruction acts of Congress, upon the allegation that they were unconstitutional. The Court held that it had no jurisdiction either to compel the President to execute constitutional laws, or to restrain his action under unconstitutional legislation.

The reasoning of the Court is embraced in the following quotation from the opinion of Chief Justice CHASE, who spoke for the whole Court:

"It will hardly be contended that Congress (the courts?) can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet, how can the right of judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President? The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such inference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refuses obedience it is needless to say the Court is without power to enforce the process. If, on the other hand, the President complies with the order of the Court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the Executive and Legislative Departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a Court of Impeachment? Would the strange spectacle be offered to the public world of an attempt by this Court to arrest proceedings in that Court?

"The questions answer themselves:" 4 Wall. 500 and 501.

The case of *Marbury* v. *Madison* (1803), 1 Cranch (5 U. S.)

137, is not in conflict, and could not be, for the President was not a party.

It may be of some interest, and not inappropriate at this point to note the fact that an unseemly conflict was narrowly escaped in that case, though the case was not against the President himself, but only against a member of his Cabinet.

Chief Justice GREEN, of New Jersey, says: "We have Mr. Jefferson's authority for saying that if the Supreme Court had granted a mandamus in the case of *Marbury* v. *Madison*, he should have regarded it as trenching on his appropriate sphere of duty; that he had instructed Mr. Madison not to deliver the commission, and that he was prepared, as President of the United States, to maintain his own construction of the Constitution with all the powers of the Government, against any control that might be attempted by the judiciary, in effecting what he regarded as the rightful powers of the Executive and Senate within their peculiar departments:" *The State* v. *The Governor* (1856), 25 N. J. L. 351.

The question of jurisdiction being conclusive, it has not been deemed important to decide whether, under the peculiar language of the statute, the delivering of the certificate made out for the complainant was necessary to invest him with a title to the office; nor whether, after the signing, attesting and sealing of that certificate, the Governor could rightfully reconsider his action and, without concurrence of the Secretary of State, issue to Evans a certificate.

But if the law be, as claimed in the bill and in the argument, that what was done with respect to the first certificate gave complainant a complete title and exhausted the power of the Governor, and that he could properly act only in conjunction with the Secretary of State, then, of course, a subsequent certificate by the Governor to Evans would neither confer title upon him nor impair the title of complainant; and there would be no sufficient reason for seeking the aid of a court of equity.

Let the decree be affirmed, and the bill dismissed at the cost of complainant.

This case is of interest as furnishing one more authority on the much mooted question of the jurisdiction of the State courts over the Governor, to compel by mandamus the performance of a ministerial act.

The general principle is of course well settled, that no public functionary of whatever grade can be compelled by the courts to perform his executive or political duties. It is quite equally well settled that, generally speaking, public officers can be required, through judicial process, to perform duties purely ministerial. A ministerial duty, as contra-distinguished from those of the executive or political class, is understood to be one in which nothing is left to discretion, but which the person upon a given state of facts performs in a prescribed manner in obedience to law: *State of Mississippi* v. *Johnson* (1867), 4 Wall. (71 U. S.) 498; *Flournoy* v. *City of Jeffersonville* (1861), 17 Ind. 169, 174.

In 1839, a case came before the Supreme Court of Arkansas on petition for mandamus, commanding the Governor to issue a commission to the petitioner as a commissioner of public buildings duly elected. The Governor declined to issue the commission, alleging as a ground for refusal that, when the election was held, there was no law in force authorizing the Legislature to hold an election for the office. The Court, without considering the merits of the case, refused the mandamus on the ground that under our system of government, the legislative, executive and judicial departments are independent of one another, and that no control, direction or review of the exercise of the functions of one department was contemplated as existing in another. The issuing of commissions was required of the Governor by a constitutional provision. It was a political duty which was not enforceable by judicial mandate. Nor could the fact that the act to be performed was merely of a ministerial or perfunctory nature, break down the barrier of separation between the departments which had been established. Said the Court in concluding its opinion, speaking by LACY, J.: "The analysis of his duties, then, clearly proves that he is in no way amenable to the judiciary for the manner in which he shall exercise or discharge these duties. His responsibility rests with the people and with the Legislature. If he does an unconstitutional act, the judiciary can annul it, and thereby assert and maintain the vested rights of the citizen. The writ asked for, however, does not proceed upon the ground that the Governor has done any illegal or unconstitutional act, but that he has refused to perform a legal or constitutional duty. In the first case, the Court certainly has jurisdiction; and in the last, they certainly have not. The Court can no more interfere with executive discretion, than the Legislature or Executive can with judicial discretion. The Constitution marks the boundaries between the respective powers of the several departments, and to obliterate its limits would produce such a conflict of jurisdiction as would inevitably destroy our whole political fabric; and with it, the principles of civil liberty itself. It would be an express violation of the Constitution, which declares upon its face, that there shall be three separate and independent departments of government, and that no person or persons, being of one of these departments, shall exercise any power belonging to either of the others:" *Hawkins* v. *Governor* (1839), 1 Ark. 570.

In 1856, an application for mandamus was made in Ohio, upon the relation of a banking association, to compel the Governor of the State to issue his proclamation, as required by statute, announcing that the relator was

entitled to commence and conduct the business of banking. The Court refused the mandamus on other grounds, but declared that ordinarily mandamus would lie against the Governor to compel the performance of his ministerial acts, such as the one before the Court. The grounds of the decision were, that, although by the Constitution the Governor was invested with important political powers, in the exercise of which his determinations were conclusive, yet that there was nothing in the nature of the chief executive office of the State which prevented the performance of duties merely ministerial being required of the Governor. The duty in question was merely ministerial, was required by statute, and might have been devolved upon any other officer of the State. It was not necessarily connected with the supreme executive power of the State. Such being the case, the Governor was amenable to law and could be required to do the specific act the same as any other public officer: *State* v. *Chase* (1856), 5 Ohio St. 528. This ruling was in the line of an utterance of the same Court as early as 1832, in *State ex rel. Loomis* v. *Moffitt*, 5 Ohio 358 (which was a *quo warranto* proceeding to try the title to a judgeship), to the effect that mandamus will lie against the Governor to compel him to issue a commission to a properly certified party, since "the Governor is no less amenable to law than the most humble citizen."

The principle enunciated in the Ohio case in 1856, would of itself be quite reconcilable with that of the earlier case in Arkansas, if there were nothing to follow by way of development of the principles of those cases. The two cases taken together, might be understood as establishing that the performance of an act required of the Governor by constitutional provision could not be compelled by mandamus, while the duty of performance of an act purely ministerial in its nature, if placed upon the Governor by the Legislature, might be enforced by such a proceeding. As matter of fact, however, later cases go much further on each side of the question, so that a harmony of decisions upon the above ground or upon any other is quite impossible.

The following are the decisions affirming the power in the courts to mandamus the Governor:

State v. *Chase*, *supra*.

Tennessee & Coosa R. R. Co. v. *Moore* (1860), 36 Ala. 371.

A sum of money had been loaned to a railroad company by act of the Legislature which required the Governor to draw his warrant in favor of the company upon certain terms being complied with, which it was shown had been done. The Court directed the issue of the writ.

Cotten v. *Ellis* (1860), 7 Jones (N. C.) 545.

Upon the relation of the Adjutant-General of North Carolina, the Court directed the writ to issue to compel the Governor to draw his warrant on the State Treasurer for salary earned.

State v. *Kirkwood* (1862), 14 Iowa 162.

The application was for a mandamus to compel the Governor to issue a certificate for certain lands. The petitioner had not complied with the conditions of the law and it was refused. The jurisdiction was, however, assumed to exist, to compel the Governor to perform ministerial duties.

Middleton v. *Low* (1866), 30 Cal. 596.

The Court declined to issue a mandamus upon the facts, but conceded that it would issue to compel the Governor to sign a patent for lands, upon the relator complying with the necessary provisions of the law.

Magruder v. *Swann* (1866), 25 Md. 173.

The application here was for a mandamus, to compel the Governor to issue a commission to the petitioner, who was elected judge, as appeared by the certificate of the clerk of the county. The duty of issuing commissions was imposed upon the Governor by Article IV, section 149, of the State Constitution of 1864, which provided that "all elections of judges and other officers provided for by this Constitution, State's attorneys excepted, shall be certified, and the returns made by the clerks of the respective counties to the Governor, who shall issue commissions to the different persons for the offices to which they shall have been respectively elected." The mandamus was allowed on the ground that, although the duty enjoined on the Governor was contained in the Constitution, it was not in that portion of the instrument relating to executive duties. Being purely a ministerial duty, it could therefore be required of the Governor or of any lower officer.

Harpending v. *Haight* (1870), 39 Cal. 189.

The Court directed the writ to issue, requiring the Governor to cause to be authenticated as a statute, a certain bill which had passed both houses of the Legislature and had not been returned with his veto. Mr. Justice TEMPLE dissented, on the ground that the duty to be performed was devolved upon the Governor by the Constitution, and that as to such duties, he was absolutely independent of control by the judiciary. [*Contra*, in Illinois: *People* v. *Yates*, *infra*].

Groome v. *Gwinn* (1875), 43 Md. 573.

The Court, by mandamus, directed the Governor to issue a commission and administer the oath of office to the Attorney-General, who had been duly returned elected.

Chumasero v. *Potts* (1875), 2 Mont. 242.

Mandamus was issued against a canvassing board, consisting of the Secretary, Marshal and Governor of the State, to compel a canvass of all the votes of the territory after a certain election, to determine the question of the removal of the seat of territorial government.

In re Cunningham (1875), 14 Kan. 416.

The Supreme Court of Kansas raised no objection to the issuing of the writ on jurisdictional grounds, but refused to compel the Governor to issue a patent for lands, because certain conditions had not been complied with by the petitioner.

Gray v. *State* (1880), 72 Ind. 567.

Mandamus was allowed against the Governor, Attorney-General, Treasurer, and Secretary of State, directing them to redeem certain bonds of the State, for whose redemption a specific fund had been provided. It was held, that other persons being joined with the Governor, upon whom, with him, was laid the duty to perform the act, it was not in any sense executive, but in the purest sense ministerial. There had been at least two previous decisions in Indiana, in which the courts issued the writ against the Governor. These were: *Governor* v. *Nelson* (1855), 6 Ind. 496, where the Governor was compelled to issue a commission to the clerk of a circuit court; and *Baker* v. *Kirk* (1870), 33 Ind. 517, where the issuing of a commission to a plaintiff as the director of a State prison, was directed. In neither of these cases, however, was the right of the Court to issue the mandamus against the Governor disputed.

The following are the decisions denying the power in the courts to issue the writ:

Hawkins v. *Governor, supra; Low* v. *Towns* (1850), 8 Ga. 360.

The Court declined to compel the Governor to issue a commission to Low as clerk of court, a statute providing that such officers should be commissioned by the Governor. The justices saw no reason why the chief executive should not be compelled by mandamus to perform a ministerial act, but refused the writ for political reasons. The Governor, it was said, has certain other duties to perform, which the needs of the people require to be done. A refusal on the part of the Governor to comply with the order of court, would subject him to imprisonment, in the event of which the person chosen by the people to act as Governor could not exercise his necessary functions.

In re Dennett (1851), 32 Me. 508. The Court declined to issue a mandamus against the Governor and council to compel them to declare the election of the petitioner to the office of county commissioner. The duty required of them was statutory.

State v. *Governor* (1856), 25 N. J. L. 331.

Mandamus was refused to compel the Governor to issue a commission to the applicant as surrogate of the county of Passaic. A constitutional provision required the Governor to issue commissions to officers of the State requiring to be commissioned. The refusal of the writ was put on the ground, *inter alia*, that the Court had no power to award a mandamus, either to compel the execution of any duty enjoined on the Executive by the Constitution, or to direct the manner of its performance.

People v. *Bissell* (1857), 19 Ill. 229.

The Court declined to compel the Governor to issue to the petitioner certain new bonds of the State, which a statute required should be issued in payment of arrears of interest on old bonds.

People v. *Yates* (1863), 40 Ill. 126.

The Court, upon facts quite identical with those in *Harpending* v. *Haight, supra*, decided directly contrary to the California court.

Mauran v. *Smith* (1865), 8 R. I. 192.

The Court refused to issue the writ against the Governor to compel him to convene a court martial for the trial of charges preferred against the petitioner.

State v. *Governor* (1867), 39 Mo. 388.

The Supreme Court of Missouri decided that it had no jurisdiction over the Governor to compel him to issue to relator a commission as a county justice. The duty of issuing such commissions was placed upon the Governor by constitutional provision, and, as a political duty, was not under the control of the courts. The same Court at an earlier period (1856), had issued a writ of mandamus against the Governor, but the latter had admitted the jurisdiction by expressing his willingness to perform the duties devolved upon him, if the Court should so direct.

Pacific Railroad v. *Governor* 23 Mo. 353; *State* v. *Warmouth* (1870), 22 La. An. 1.

A statute required the Governor to sign and deliver to the State Auditor, for issuing to parties entitled, bonds due contractors for public works. The Court declined to compel the Governor to sign and deliver certain bonds claimed by the petitioner.

Rice v. *Austin* (1872), 19 Minn. 103.

The Court refused the writ asked for to compel the Governor to execute and deliver to petitioner a deed of certain lands claimed under the provisions of a statute. The act was conceded to be a ministerial act. In an earlier case in the State, *Chamberlain* v. *Sibley* (1860), 4 Minn. 309, it was admitted *obiter*, that the Governor could be compelled to perform his ministerial duties. In *Rice* v. *Austin*, however, the dictum in *Chamberlain* v. *Sibley* was repudiated

(without reference to the case however), and the independence of the executive department declared to depend as much upon the non-interference of the judiciary in the ministerial functions of his office as in those strictly executive in their nature.

Sutherland v. *Governor* (1874), 29 Mich. 320.

The application to the Court was for an order requiring the Governor to show cause why he did not issue a certificate, showing that the Portage Lake and Lake Superior ship canal and harbor had been constructed in conformity to an act of Congress, which required the Governor to issue his certificate of the fact. Mr. Justice COOLEY for the Court, in refusing the writ, took very broad grounds against the jurisdiction, declaring that all duties imposed upon the Governor as such, whether by constitution or by statute, were official, and in the matter of their performance, he was not liable to mandamus.

Turnpike Company v. *Brown* (1875), 8 Baxt. (Tenn.) 490.

The facts of this case were as recited in the principal case, the Court refusing the mandamus.

In *Appeal of Hartranft et al.* (1877), 85 Pa. 433, it was held by the Supreme Court of Pennsylvania that the Governor and certain other State officers were not liable to attachment for disobeying a subpoena to testify before a grand jury as to matters of fact in connection with certain riots at Pittsburgh, with which facts they became conversant in performing the duties of their respective offices. In the course of the opinion, the Court, referring to *State* v. *Warmouth, supra*, approves of the doctrine that the Governor is not subject to mandamus, to compel the performance of a ministerial duty.

State v. *Drew* (1879), 17 Fla. 67.

The mandamus asked for was to have the Governor compelled to issue to the relator a commission as United States Representative, after the Board of Canvassers had declared him elected. The laws of Florida required the Governor to make out, sign, cause to be sealed and transmit a certificate of election. The writ was refused, Mr. Justice WESTCOTT dissenting.

People v. *Cullom* (1881), 100 Ill. 472.

The Court of last resort in Illinois declined to mandamus the Governor to call an election as required by law.

SUMMARY.

It will thus be seen that the courts of nine States and Territories (to wit, Alabama, California, Indiana, Iowa, Kansas, Maryland, Montana, North Carolina, and Ohio), affirm the jurisdiction; while the courts of eleven States (to wit, Arkansas, Florida, Georgia, Illinois, Louisiana, Maine, Michigan, Missouri, New Jersey, Rhode Island, and Pennsylvania), deny it.

In the difference of opinion that has existed among the State courts, resort has been had to the decisions of the Supreme Court of the United States, on the subject of mandamus to executive officers of the Federal Government. The Federal courts, as shown in the principal case, have several times enjoined State Governors. These decisions are, however, scarcely relevant to the question of the jurisdiction of the State courts over the executive department of the State. The Federal Government sprang not from the States, but from the people of the United States. If the Governor of a State refuses to perform a ministerial duty, lawfully required of him, and the Federal courts have jurisdiction on other grounds, there is perhaps no reason why they should decline jurisdiction by mandamus or injunction, merely because his status *qua* the State, happened to be that of chief executive officer. There is apparently nothing in

the relations of the Federal and State systems, requiring the Federal courts to regard as independent of their control, the executive officers of a State. The Federal courts are bound to respect the separation of functions of the legislative, executive and judicial departments established by the Constitution of the United States, and to recognize the independence of each, but this obligation does not require the same recognition of the similar departments established by the State. It was decided in *Kentucky* v. *Dennison* (1860), 24 How. (65 U. S.) 66, that Congress had no power to impose duties upon State officers, and that such duties attempted to be imposed the Federal court could not enforce. But as indicated above, a ministerial duty plainly and lawfully required of a State officer, is clearly within the cognizance of the Federal courts.

The only relevant analogy in the Federal legislation is the relation of the Federal courts to the President. It has never been decided that the President is or is not subject to mandamus to compel him to perform ministerial duties.

Marbury v. *Madison* (1803), 1 Cranch (5 U. S.) 137, is the leading case on mandamus in the United Courts. The action was brought to compel President Jefferson's Secretary of State, Mr. Madison, to deliver to the plaintiffs their commissions as justices of the peace in the District of Columbia. They had been appointed and confirmed during the administration of President Adams, and their commissions had been signed and sealed. The Court decided that the Supreme Court of the United States had no original jurisdiction to consider the case, and discharged the rule which had been granted. Chief Justice MARSHALL, however, in the course of his opinion, declared in favor of the granting of the writ in general against public officers, for the performance of such ministerial duties as were required of Mr. Madison. The principles there stated have been recognized and followed, as applied to similar cases. Some of the expressions used have furnished the basis for the doctrine of those courts that sustain the issuing of the writ against the Governor. For example, it was said, *inter alia*, by the Court: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined:" p. 170.

There are other expressions, indicating that there was no purpose to express an opinion that the President, equally with his cabinet officers, was amenable to the writ. And, indeed, it was conceded by counsel in the case, that the President was not personally subject to mandamus; Charles Lee, attorney for the plaintiffs, who had been Attorney-General, saying, p. 149: "I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode provided in the Constitution."

A number of other cases have confirmed the jurisdiction of the courts to compel the performance of the purely ministerial duties of cabinet and other similar officers. Among these are *Kendall* v. *United States* (1838), 12 Pet. (37 U. S.) 524; *United States* v. *Schurz* (1880), 102 U. S. 378; *Butterworth* v. *United States* (1884), 112 Id. 50; *United States ex rel. Miller* v. *Black* (1888), 128 Id. 40.

In the *State of Mississippi* v. *Johnson* (1867), 4 Wall. (71 U. S.) 475, it was sought to enjoin President Johnson from carrying out the Reconstruction Acts. The Court ruled, upon the only point

necessary to a decision, that the President cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional. It refused (p. 498), to express an opinion whether, in any case, the President might be required by the process of the Court to perform a purely ministerial act under a positive law. In the briefs of counsel in this case are presented very fully and forcibly the arguments that exist in favor of and against the jurisdiction of the courts over the chief executive officer of the United States.

In the course of the opinion of the Court in *Kendall* v. *The United States* (1838), 12 Pet. (37 U. S.) p. 610, it was said: "The executive power is vested in a President; and as far as his powers are derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution, through the impeaching power."

In the judgment of the writer, the weight of the argument is with the view taken by the Supreme Court of Tennessee in the principal case, that mandamus will not lie against the Governor. The courts that take jurisdiction, do so on the general principle that when one man shows himself entitled to a specific thing in the form of property or office and he is deprived of it by another, the courts will provide the means for his obtaining it, following the maxim that there is no wrong without a remedy. If this were the only possible aspect of the question, there would be no reason for the court withholding its arm in any case where the failure to perform a ministerial duty were established to its satisfaction, whether the defendant happened to be the Governor of the State, or an officer of less dignity.

It is quite impossible, however, to ignore the fact that the courts exercise their functions as part of a governmental system embodied in a written constitution, which has as its fundamental principle of organization the complete independence of the executive and judicial as well as legislative departments. If the judicial department may, in any case, direct or control the performance of a duty by another department, the barrier of separation is at once broken down.

It is no answer to say that in matters purely ministerial, the Governor does not exercise executive functions, and therefore is subject to judicial control as to such acts. Said TALIAFERRO, J., in *State* v. *Warmouth, supra:* "We think this doctrine objectionable in this, that it accords to the judiciary the large discretion of determining the character of all the acts to be performed by the chief executive officer, as being merely ministerial or otherwise. This would infringe the right of the executive to use discretion in determining the same question. He must be presumed to have this discretion, and the right of deciding what acts his duties require him to perform, otherwise his functions would be trammeled, and the executive branch of the Government made subservient in an important feature to the judiciary."

If it be said that to give the governor the power of final determination, as to the performance of acts required of him, would be to acknowledge an authority higher than the law, the answer is at hand, that the law from which the judges derive their power to act is the constitution, and no supremacy or control can be asserted or maintained by them that is not recognized by that instrument.

The best answer to the position, that if the governor is free from control by the courts, parties having rights will in many cases be left without remedy, is given by COOLEY, J., in *Sutherland* v.

Governor (1874), 29 Mich., at page 330: "Practically, there are a great many such cases, but, theoretically, there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict, or an erroneous ruling of a judge, and though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the State may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor, and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal, constitute any ground for interference by any other authority? The law must leave the final decision upon every claim, and every controversy somewhere, and when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action, which under the constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision."

And it is not easy to see why the courts shall have any more power of control over the action of the governor in any given case, if the duty required of him happens to be statutory, than if imposed by the constitution. So long as it is required of him as governor, that is, as the functionary occupying the chief executive office, in performing it, it would seem, he may claim the officer's immunity from control.

Of course it is not contended that the governor, as a private citizen, is free from liability to judicial process. It is admitted by all the courts that for his private acts, or for any acts not properly within the scope of his office, he is, as any other citizen, amenable to process.

The logic of the argument relieving the governor from judicial process, requires that where, by the constitution of the State, the executive department is specifically vested in other officers with him, they, as well as he, are free from control or direction at the hands of the courts. Accordingly, in *Houston Tap & Brazonia R. R. Co.* v. *Randolph* (1859), 24 Tex. 317, the Court for this reason refused to compel the Treasurer of the State to pay certain bonds, the warrants for whose payment were duly presented, in strict compliance with law.

So, in *County* v. *Dike* (1874), 20 Minn. 363, the Constitution of Minnesota providing that the executive department should consist of a governor, lieutenant-governor, secretary of state, auditor, treasurer, and attorney-general, chosen by the electors of the State, it was held that a mandamus would not lie against the State Treasurer and Secretary of State.

It will be observed that the Constitution of the United States vests the executive power solely in the President. It is, therefore, quite in keeping with the above view, that mandamus proceedings should be entertained against Cabinet officers in certain cases, since they are not, by the organic law, vested with any executive power, and therefore made part of an independent branch of the Government.

The judgment in the principal case has been criticised as not being warranted by the facts. It has been urged that the case really presented the question of whether the Governor, after signing the commission, which entitled

the relator to it as a vested right, could lawfully withhold it from him or issue a commission to another. Counsel for the relator contended with much force that the Governor's power of acting being *functus officio*, he could not preserve an immunity from judicial cognizance of his subsequent acts in the matter, merely because he honestly believed that, as Governor, he still had the power to act by awarding the commission to another. If, as Governor, he had no further power to act, it was forcibly urged he could not obtain that power merely by supposing he had it. It was therefore deemed by the relator essential that the Court should pass upon the question of his title. This the Court declined to do, resting its decision solely upon the ground that no jurisdiction existed to control the Governor's acts in the premises. It seems to the annotator obvious that the Court upon its view of the constitutional question involved, was right in declining to enter into any other discussion. The Court either had or had not jurisdiction over the Governor by mandamus and injunction in his official capacity. The fact that the Governor assumed to act, when his power was exhausted, could not give jurisdiction to the courts, if the law of the land denied it. The fact that practically an irreparable wrong might be perpetrated by the Governor upon the relator by withholding his commission, could not vest authority in the courts to redress the wrong, if they had not that power given them under the system of government of which both the executive and the judiciary were parts.

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[In the case of *Riley* v. *Hovey*, decided by the Supreme Court of Indiana, May 18, 1889, the court ordered a mandate against the Governor, compelling him to issue a commission to Riley as a trustee, elected by the Legislature, for the Institution for the Blind. The question agitated, however, was merely whether the Legislature could elect to the office.] J. B. U.